ARIA KUMAR @ OMAR BIN ABDULLAH & ANOR.

v.

KETUA PENGARAH JABATAN HASIL DALAM NEGERI, MALAYSIA & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
DATO' WAN ADNAN BIN ISMAIL J.
[ORIGINATING SUMMONS NO. R2-24-76-89]
14 SEPTEMBER 1994

DECLARATION: Plaintiffs employed by government as tax assistants - Plaintiffs transferred to Kuala Terengganu - Appeal against transfer - Appeal rejected - Appeal to Secretary General of the Ministry of Finance - Kuala Terengganu office sending AR registered letters to plaintiffs requesting they report to work -Letters returned undelivered - Plaintiffs deemed dismissed from service by gazette notification - Plaintiffs seeking declaration that their dismissal void and ultra vires - Whether plaintiffs entitled to declaration sought - Whether transfer was a mala fide exercise of power - Plaintiffs claiming that Regulation 21(5) of the Public Officers (Conduct & Discipline) Chapter D General Orders 1980 not complied with - Whether claim justified -Consideration of Regulation 21(6).

The plaintiffs were employed by the government as tax assistants with the Department of Inland Revenue and were stationed in Kuala Lumpur. By a transfer list dated 9 July 1988 the plaintiffs were transferred to Kuala Terengganu. They appealed by letter to the Timbalan Ketua Pengarah of the Department against the transfer but their appeal was rejected. On 2 August 1988 they met the Ketua Pengarah and handed him another appeal letter but was informed that he could not interfere with the transfer. He advised the plaintiffs to appeal to the Secretary General of the Ministry of Finance which they did by letter dated 22 August 1988. Reminders were sent on 10 October 1988 and again on 31 January 1989. The reply was not favourable. Meanwhile, on 26 August 1988 the Kuala Terengganu office sent the plaintiffs AR registered letters requesting the plaintiffs to report for work failing which disciplinary action would be taken against them. The letters were returned undelivered and by Gazette Notification No. 890 dated 2 March 1989, they were deemed dismissed from service.

The plaintiffs applied for *inter alia*, a declaration that the dismissal of the plaintiffs by Gazette Notification was void and ultra vires on the grounds that the transfer was a *mala fide* exercise of power and that Regulation 21(5) of the Public Officers (Conduct & Discipline) Chapter D General Orders 1980 had not been complied with.

Held:

[1] Following the Federal Court's decision in *Pengarah Pelajaran, Wilayah Persekutuan & Ors v. Loot Ting Yee* [1982] 1 MLJ 68, the right of the government to transfer civil servants cannot be questioned.

[2] Under regulation 21(5) of the Public Officers (Conduct & Discipline) Chapter D General Orders 1980 before the Head of Department can cause the AR letter to be sent, the officer, firstly, must be absent and secondly, cannot be traced. It is not sufficient that he is only absent. It must be shown that he cannot be traced. The Court found from the facts and circumstances surrounding the case that the plaintiffs could easily have been traced during the period. In all their letters of appeal they put as their address the Jabatan Hasil Dalam Negeri, Kuala Lumpur. They thus expected replies to be sent to

that address and they in fact received the reply from the Secretary General of the Ministry of Finance which was redirected to them by the Jabatan Hasil Dalam Negeri. No effort at all was made to trace them before the AR letters were sent to them. It was essential that some effort be made to trace them. It was only upon failure to find them after efforts to trace them had been made that they could be said to be "cannot be traced". Regulation 21(5) had not been complied with as one pre-condition had not been fulfilled. The plaintiffs were therefore entitled to the declaration and the orders prayed for.

[Application allowed with costs].

Case referred to:
Pengarah Pelajaran, Wilayah Persekutuan & Ors. v. Loot Ting Yee [1982] 1 MLJ 68 ***(foll)***

Legislation referred to:
Public Officers (Conduct & Discipline) Chapter 'D' General Order 1980, O. 21(4), (5), (6), 26

For the plaintiff - V. Kanagalingam; M/s. V.K. Lingam & Co.
For the defendants - Abdul Karim bin Abdul Jalil, Senior Federal Counsel

JUDGMENT

Wan Adnan Bin Ismail J:
By this summons the plaintiffs pray for the following declaration and orders:

1. A declaration to be granted that the termination/dismissal of the plaintiffs' services as pembantu cukai purported to have been effected by the defendants by Gazette Notification dated 2 March 1989 is void, of no legal effect, inoperative and *ultra vires* and the plaintiffs are still pembantu cukai of the defendants;
2. An order that the defendants do pay to the plaintiffs all arrears of pay, allowances and other emoluments due and owing to the plaintiffs as pembantu cukai of the defendants from the date of the impugned transfers;
3. An account of what is due to the plaintiffs from the defendants in respect of salary and all other emoluments as pembantu cukai of the defendants and an order for payment by the defendants to the plaintiffs of any sums due upon taking such account;
4. Such further and other relief as this Honourable Court may deem fit, proper and just to grant;
5. Costs of and incidental to this application be costs in the cause.

The first plaintiff and the second plaintiff were at the material times employed by the Government as tax assistants with the Department of Inland Revenue, Malaysia. The second plaintiff is the wife of the first plaintiff. Both were stationed in Kuala Lumpur.

By a transfer list dated 9 July 1988 both plaintiffs were transferred to Kuala Terengganu. They appealed against the transfer. By letter dated 1 August 1988 the Timbalan Ketua Pengarah of the Department rejected their appeal. On 2 August 1988 they met the Ketua Pengarah himself (Y.M. Datuk Seri Raja Abdul Aziz) and handed him another appeal letter. The Ketua Pengarah told them that he could not interfere with the transfer. They were advised to appeal to the Secretary General of the Ministry of Finance. As advised they made the appeal by their letter dated 22 August 1988. As there was no reply they sent a reminder on 10 October 1988. The plaintiffs' address stated in the said letters was Jabatan Hasil Dalam Negeri, Jalan Duta, Kuala Lumpur. Subsequently they met the Ketua Pengarah twice and they were advised to pursue the

appeal with the Secretary General of Ministry of Finance. They sent another reminder on 31 January 1989. The reply came by letter dated 12 April 1989 which was not favourable.

In the meantime on 26 August 1988 the Kuala Terengganu office of the Department sent A.R. Registered letters to the plaintiffs. The contents are as follows:

> **Tidak Hadir Bertugas**
>
> Adalah saya dengan hormatnya diarah menarik perhatian tuan kepada perkara yang tersebut di atas dan ingin memaklumkan bahawa tuan telah didapati tidak hadir bertugas tanpa cuti atau tanpa sebab-sebab yang munsabah atau kebenaran terlebih dahulu mulai 4 August 1988 hingga sekarang.
>
> 2. Dengan ini sukacita diberitahu berhubung dengan pertukaran tuan ke Cawangan Kuala Terengganu, tuan dengan ini diminta melaporkan diri dengan serta-merta. Sekiranya tuan tidak melaporkan diri dengan segera, adalah tuan dianggap tidak hadir bertugas tanpa cuti atau sebab-sebab yang munasabah. Tindakan tatatertib dengan tujuan buang kerja mengikut Perintah Am 21(4) dan 26 Perintah-Perintah Am Pegawai Awam (Kelakuan dan Tatatertib) (Bab 'D') 1980 akan diambil terhadap tuan.

The said letters were returned to the Department undelivered.

Further action was taken against them and by Gazette Notification No. 890 dated 2 March 1989 they were deemed to have been dismissed from service.

The plaintiffs' first ground is that the transfer was a form of punishment. It was a *mala fide* exercise of power.

In the case of *Pengarah Pelajaran, Wilayah Persekutuan & Ors. v. Loot Ting Yee* [1982] 1 MLJ 68, the Federal Court held as follows:

> Thus whether a civil servant should be transferred, and if so where and when the transfer is to be made are matters for the government to decide. No useful purpose could thus be served in this case by holding a full trial of the respondent's allegations of *mala fide* and unreasonableness.

The right of the Government to transfer civil servants cannot be questioned.

This first ground must therefore fail.

The other ground of the plaintiffs is that Regulation 21(5) of Public Officers (Conduct & Discipline) Chapter D General Orders 1980 had not been complied with. This Regulation and Regulation 21(6) read as follows:

> 21(5) Where an officer **is absent and cannot be traced,** the Head of Department shall cause to be sent to the officer's last known address an "A.R." (Acknowledged of Receipt) registered letter requiring him to give an explanation as to his absence and at the same time directing him to report for duty at once. If within seven days after the receipt of the letter the officer reports for duty, the Appropriate Disciplinary Authority shall institute disciplinary action either under paragraph (3) or (4) of this General Order. If seven days after the receipt of the letter by the officer, he is still absent or nothing is heard of or from him, the Head of Department shall proceed to submit a report to the Appropriate Disciplinary Authority as required under paragraph (4). Upon consideration of the said report the Appropriate Disciplinary Authority shall institute disciplinary action either under paragraph (3) or (4) of this General Order, but in cases where the said letter is returned undelivered, the Disciplinary Authority shall take steps to notify in the **Gazette** the fact of the officer's absence and his untraceability. (emphasis added).

(6) If despite notification in the **Gazette,** the officer fails to return for duty within a period of seven days from the date of the publication of the **Gazette,** the officer shall be deemed to have been dismissed from the service with effect from the date of his absence. If within seven days after the publication of the **Gazette** the officer reports for duty, the Appropriate Disciplinary Authority shall institute disciplinary action either under paragraph (3) or (4) of this General Order.

(emphasis added).

Under Regulation 21(5) before the Head of Department can cause the A.R. letter to be sent, the officer, firstly, must be absent and secondly, cannot be traced. It is not sufficient that he is only absent. It must be shown that he cannot be traced.

I find from the facts and circumstances surrounding the case the plaintiffs could easily have been traced during the period. When they were told of their transfer to Kuala Terengganu they made an appeal. By letter dated 1 August 1988, the Timbalan Ketua Pengarah rejected their appeal. On 2 August 1988 they met the Ketua Pengarah himself. Then they appealed to the Secretary General of the Ministry of Finance by their letter dated 22 August 1988. In all their letters of appeal they put as their address the Jabatan Hasil Dalam Negeri, Kuala Lumpur. They thus expected their replies to be sent to that address. The reply from the Secretary General of the Ministry of Finance dated 12 April 1989 was sent to that address. The reply still reached them because it was redirected to them by the Jabatan Hasil Dalam Negeri.

No effort at all had been made to trace them before the A.R. letter dated 26 August 1988 was sent to them. It was essential that some efforts be made to trace them. It was only upon failure to find them after efforts to trace them had been made that they could be said to be "cannot be traced".

I therefore find that Regulation 21(5) had not been complied with. One pre-condition had not been fulfilled.

The plaintiffs are therefore entitled to the declaration and the orders prayed for.

This application is allowed with costs.